

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0400
STATE CORPORATE INCOME TAX
For 1991, 1992, 1993, 1994, and 1995**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Income Tax – Apportionment Calculations

Authority: 45 IAC 3.1-1-53; IC 6-3-2-2(e); *Blue v. Beach et al.*, 155 Ind. 121; 56 N.E. 89; S.C. IN 1900

Taxpayer protests the addition of gross receipts from the out of state sale and out of state delivery of tangible property to its adjusted gross income apportionment sales factor.

STATEMENT OF FACTS

Taxpayer, a supplier of natural gas located in Indiana, entered into contracts with various entities to supply them with natural gas. These transactions consisted of the taxpayer purchasing the gas at an out of state entity and transporting it by interstate pipelines to the purchaser at a separate out of state location. The audit report added the income from these transactions to the numerator of the taxpayer's adjusted gross income apportionment sales factor. Taxpayer filed a timely protest to these adjustments.

I. Income Tax - Apportionment Calculations

DISCUSSION

Audit report cited 45 IAC 3.1-1-53, Example #6 as the basis for this adjustment. This regulation, in relevant part, states:

When Sales of Tangible Personal Property Are in This State. Gross receipts from the sales of tangible personal property (except sales to the United States Government-See Regulation 6-3-2-2(e)... are in this state: (a) if the property is delivered or shipped to a purchaser within this state regardless of the F.O.B. point or other conditions of sales; or (b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser....

Examples:

....

(6) If a taxpayer whose salesman operated from an office located in Indiana makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the sale will be attributed to the state from which the property is shipped if the taxpayer is taxable in that state. *If the taxpayer is not taxable in the state from which the property is shipped, then the property will have been deemed to have been shipped from Indiana and the sale is attributed to Indiana. (Emphasis added)*

The statute cited in and construed by the above regulation is IC 6-3-2-2(e), which states in relevant part:

(2) Gross receipts from the sale of tangible personal property (except sales to the United States Government) are in this state:

- (a) if the property is delivered or shipped to a purchaser within this state regardless of F.O.B. point or other condition of sale; or
- (b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser.

Taxpayer argument centers on the construed statute's explicit requirement for the tangible property in question to either originate in or be delivered to Indiana and the expansion of that requirement by the regulation. Taxpayer cites to *Blue v. Beach et al.*, 155 Ind. 121; 56 N.E. 89; (S.C. IN 1900), which states in relevant part:

The rule in respect to the delegation of legislative power is admirably stated in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716 (1873) as follows: "Then, the true distinction, I conceive, is this: The legislature can not delegate its power to make a law; *but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.* To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which can not be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." *(Emphasis added)*

Taxpayer's contention that an expansion of a statute's scope by an administrative regulation is not permitted is correct, although, as the court notes the clarification of a statute's scope is a delegateable power of the legislature, which has been done in IC § 6-8.1-3-3(a); which states:

The department shall adopt, under IC 4-22-2, rules governing:

- (1) the administration, collection, and enforcement of the listed taxes;
- (2) the *interpretation of the statutes* governing the listed taxes;
- (3) the procedures relating to the listed taxes; and
- (4) *the methods of valuing the items subject to the listed taxes.*

(Emphasis added)

Gross receipts from the sale of tangible property are defined by the statute as in this state and are to be added to the numerator of the apportionment formula when they are either (a) delivered or shipped to a purchaser within this state regardless of F.O.B. point or other condition of sale; or (b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser. (IC 6-3-2-2(e)(2))

IC-6-3-2-2 (e)(2)(a) requires delivery or shipment to “a purchaser within this state.” This is not the case in this situation and thus not applicable.

Taxpayer concedes that taxpayer is not taxed, or taxable, in the states where the transactions at issue occur and thus the gross receipts are eligible under the second half of IC-6-3-2-2(e)(2)(b)-“and the taxpayer is not taxable in the state of the purchaser.” However the first half of this requirement, “the property is shipped from an office, store, factory, or other place of storage in this state,” is not established. The two halves of this requirement are joined by the conjunction “and,” requiring both be fulfilled before the definition is met, which is not the result under these facts.

The precept of 45 IAC 3.1-1-53 paraphrases IC-6-3-2-2(e) with the preceding analysis of IC-6-3-2-2 (e)(2) applicable.

45 IAC 3.1-1-53, Example 6, states in relevant part, “If the taxpayer is not taxable in the state from which the property is shipped, then the property will have been deemed to have been shipped from Indiana and the sale is attributed to Indiana.” By taxpayer’s admission to the non-taxability of the transaction by the state where the purchase was made and the tangible goods were shipped from, the gross receipts from this transaction should be added to the numerator of the taxpayer’s adjusted gross income apportionment sales factor.

Inasmuch as the regulation is dealing with an issue not explicitly covered by the statute, i.e. income unattributable to any state under the existing apportionment statute, the regulation relied on by the Department does not constitute an expansion of the statute, rather a permissible and anticipated clarification of the statute as is required of the Department by IC § 6-8.1-3-3(a). Consequently, Example 6 is authorized to address the apportionment of the taxpayer’s income from nontaxable transactions involving the out of state purchase, shipment, and delivery of tangible property.

FINDING

Taxpayer protest denied.